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SIMPLEX SDN BHD & ORS v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
YAACOB MD SAM JCA
SURAYA OTHMAN JCA

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[CRIMINAL APPEAL NO: W-09-15-01-2017]
5 JANUARY 2021

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CUSTOMS AND EXCISE: *Customs Act 1967 – Section 135(1)(g) – Under-declaring value of goods at time of import – Allegations of fraudulently evading customs duties and taxed imposed on goods imported – Property seized following allegations of proceeds of unlawful activity – Whether there were elements of customs duties involved – Whether there was link connecting monies seized and unlawful activity – Whether Customs Department offered any compound or prosecuted – Whether prosecution succeeded in disclosing that offence under s. 135(1)(g) of*

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Customs Act 1967 had been committed

CRIMINAL LAW: *Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 56(1) – Forfeiture – Allegation of fraudulently evading payment of customs duties and taxes on goods at time of import – Whether elements of offence established – Whether offence committed*

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The first appellant was a company running the business of importing, dealing and retailing in kitchen equipment and spare parts. The Public Prosecutor ('respondent') alleged that the first appellant had committed an offence under s. 135(1)(g) of the Customs Act 1967 ('Act'), by under-declaring the value of the kitchen equipment ('goods') imported between January 2010 and

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December 2011 ('said period'), and therefore, fraudulently evading customs duties and taxed imposed on the goods at the time of import. The respondent seized RM390,932.70 from the first appellant's Maybank account ('seized property') which were alleged to be the proceeds of the unlawful activity or offence committed during the said period. The respondent proceeded to

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make an application to the High Court, pursuant to s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUA') to forfeit the seized property. The High Court allowed the respondent's application. Hence, the present appeal. In support of the appeal, the appellants submitted that: (i) the seized property

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was the balance of monies remaining in the first appellant's bank account as of 20 May 2014. The seized property was the proceeds of the sale of non-dutiable goods imported by the first appellant on 2 May 2014 and sold to KFC, Malaysia. It was not the proceeds of an offence during the said period; (ii) no element of customs duties were involved and no offence of

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fraudulent evasion of any custom duties was disclosed; (iii) the first

appellant, upon receipt of RM1,546,156.80 from KFC, Malaysia, for the sale of the non-dutiable kitchen equipment, had remitted RM1,496,990 to Simplex Private Ltd, Singapore as the exporter/supplier of the kitchen equipment to the first appellant. Upon remittance, the balance sum of monies in the first appellant's bank account was RM427,719.56 as of 27 June 2014 which was finally frozen. On 21 July 2014, the respondent, upon a request by the first appellant, instructed Maybank Bhd to release to the first appellant a sum of RM55,000 from the seized property, leaving the balance sum of RM390,932.70 which was currently the seized property in question; (iv) the Customs Department did not demand or claim from the first appellant to recover any short-paid customs duties and taxed, if any, as provided under s. 17 of the Act for the said period; (v) the Customs Department did not offer any compound nor prosecute the first appellant if it was true the latter had committed an offence; (vi) following the freezing and seizing order, the first appellant had to borrow RM392,065.42 from a third party to make certain payments; (vii) the respondent failed to produce any credible and reliable evidence that the seized property was related or connected to the alleged offence; and (viii) it was unsafe for the High Court Judge ('HCJ') to rely on the allegation by the respondent without any proof of the commission of an offence in respect of the goods.

Held (allowing appeal)
Per Suraya Othman JCA delivering the judgment of the court:

(1) The first appellant had produced unchallenged evidence that the seized property was the balance of monies remaining in the first appellant's bank account as of 20 May 2014. The seized property were the proceeds of the sale of non-dutiable goods to KFC, Malaysia which were imported by the first appellant on 2 May 2014 and were not the proceeds of an offence alleged to have taken place during the said period. Therefore, it did not give rise to any element of fraudulent evasion of any customs duties. The respondent never challenged this crucial piece of evidence. Therefore, the respondent failed to disclose that an offence under s. 135(1)(g) of the Act had been committed. Further, the respondent had not commenced any prosecution against the appellants in respect of any offence under s. 135(1)(g) of the Act nor had the respondent made written demand, pursuant to s. 17 of the Act, to claim from the first appellant any short-paid taxes for under-declaration of the goods during the said period. (paras 37-39)

(2) The allegation of a violation against the AMLATFPUA by way of fraudulently evading the payment of customs duties and taxes on such goods at the times of import was done during the said period. However, the respondent only seized the monies from the first appellant's

Maybank account on 25 July 2014. The respondent failed to show that the seized property was the money obtained from any transactions which were carried out during the said period. The respondent, therefore, failed to show the nexus or link between the monies seized and the unlawful activity. Otherwise, the Customs Department would have offered to issue a compound or prosecute the first appellant if it was true, as alleged by the respondent, that the first appellant had committed an offence under s. 135(1)(g) of the Act. (para 41)

(3) When the first appellant's bank account was frozen, the monies available in the first appellant's bank account was RM427,719.56, which was the balance of monies remaining in the first appellant's bank account after receipt of RM1,546,156.80 from KFC and after remitting RM1,496,990 to Simplex Private Ltd, Singapore for the import of the non-dutiable kitchen equipment. If the seized property was obtained from an unlawful activity, then the seized property must be seized in its total sum which was frozen to the amount of RM427,719.56 and not the balance amount after releasing the sum of RM55,000. The instruction to Maybank Bhd to release a sum of RM55,000 from the total sum of RM427,719.56 to the first appellant itself could lead to a conclusion that the seized property (initially at RM427,719.56) were not the proceeds of any unlawful activity or proceeds of any offence under s. 135(1)(g) of the Act. Thus, the respondent failed to prove in what circumstances they had released the sum of RM55,000 to the first appellant. (paras 42 & 44)

(4) The decision of the HCJ was set aside. There was no sufficient judicial appreciation of the law and facts by the HCJ. In fact, the HCJ misdirected himself as to the facts and law in ordering the forfeiture of the seized property under s. 56(2) of the AMLATFPUA when the respondent failed to prove, in the first instance, that an offence had been committed in respect of the goods imported on 2 May 2014 and that the seized property was related to the offence of under-declaration or evasion of duties and taxes of the said goods. (paras 49 & 50)

Case(s) referred to:

Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Ming Holdings (M) Sdn Bhd v. Syed Azahari Nor Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***
PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***
PP v. Billion Nova Sdn Bhd & Ors [2016] 2 CLJ 763 CA ***(refd)***
PP v. Kuala Dimensi Sdn Bhd & Ors [2019] 3 CLJ 650 CA ***(refd)***
Teh Tek Soon lwn. PP [2015] 1 LNS 1504 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3, 4(1)(a), 44(1), 50, 56(1), (2), (4), 61, 70(1), (2)

Customs Act 1967, ss. 13(1), 17, 135(1)(g), Second Schedule

For the appellants - JR Ravendren, Agalya J Munusamy & Janeni Devi Ravendren; M/s J R Ravendren & Assocs

For the respondent - Nurulhuda Nur'aini Mohamad Nor; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal No: 44-62-06-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Suraya Othman JCA:

Introduction

[1] The respondent (Public Prosecutor) alleged that the first appellant (Simplex Sdn Bhd) had committed an offence under s. 135(1)(g) of the Customs Act 1967 (Act 235) by under-declaring the value of the kitchen equipment ie, Manitowoc Ice Machine, Taylor Soft Serve Freezer, Manitowoc Half-dice, Menu-master Oven and Manitowoc Ice Dispenser (hereinafter collectively referred to as "said goods") imported from the period of January 2010 until December 2011 and thereby the first appellant had fraudulently evaded the customs duties and taxes imposed on the said goods at the time of import. The respondent then on 23 September 2014 seized RM390,932.70 from the first appellant's Maybank Bhd current account no. 014280-402164 ("the seized property") which the respondent alleged were the proceeds of the unlawful activity or offence committed from the period of January 2010 until December 2011. The respondent then made an application to the High Court pursuant to s. 56(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUA) (Act 613) to forfeit the seized property.

[2] The learned High Court Judge allowed the respondent/applicant's application made under s. 56(1) Act 613 to forfeit the seized property of RM390,932.70 and any accretion to it held in the Maybank Bhd current account no. 014280-402164 belonging to the first appellant.

[3] Dissatisfied, the first appellant appealed against the decision of the learned High Court Judge. We heard submissions from both parties and after perusing through the appeal records, we found merits in the appeal. Unanimously, we allowed the appeal. The decision of the learned High Court Judge was set aside. Herein below are our grounds.

A **Background**

[4] By way of a notice of motion under s. 56(1) Act 613 dated 24 June 2015, the respondent/applicant moved the High Court for the orders as follows:

B (i) to publish a notice in a *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court to show cause as to why the property shall not be forfeited; and

(ii) to forfeit the seized property of RM390,932.70 and any accretion to it held in the Maybank Bhd current account no. 014280-402164 belonging
C to the first appellant.

[5] The relevant affidavits filed by the respondent/applicant and the appellants respectively in relation to the application are as follows:

(i) "afidavit" by Mohd Farez bin Rahman affirmed on 22 June 2015
D (pp. 4 to 7, vol. 3A);

(ii) "afidavit prediket" by Lim Kee Yee affirmed on 22 June 2015 (pp. 8 to 31, vol. 3A);

(iii) "afidavit AMLATFPUAA" by Mohd Samsol bin Md Muzer affirmed on 22 June 2015 (pp. 2469 to 2482, vol. 3 NA);
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(iv) "afidavit jawapan responden-responden (1)" by Lim Chee Son @ Lim Chee Song affirmed on 30 July 2015 (pp. 2763 to 2799, vol. 3 OA);

(v) "afidavit jawapan (1) pegawai penyiasat pertama" by Lim Kee Yee affirmed on 2 November 2015 (pp. 3323 to 3326, vol. 3 P);
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(vi) "afidavit jawapan (1) pegawai penyiasat kedua" by Mohd Samsol bin Md Muzer on 2 November 2015 (pp. 3328 to 3334, vol. 3 P);

(vii) "afidavit jawapan responden-responden (2)" affirmed on 18 November 2015 (pp. 3336 to 3351, vol. 3 P);

G (viii) "afidavit jawapan (2) pegawai penyiasat pertama" by Lim Kee Yee affirmed on 23 March 2016 (pp. 3352-3355, vol. 3 P);

(ix) "afidavit jawapan (2) pegawai penyiasat kedua" by Mohd Samsol bin Md Muzer on 23 March 2016 (pp. 3357 to 3362, vol. 3 P).

H **[6]** On 4 August 2016 pursuant to s. 61 of Act 613, the respondent caused a notice to be published in a *Gazette* P.U.(B) 352 calling upon any third party who claims to have any interest in the property to attend before the court to show cause as to why the seized property shall not be forfeited.

[7] On 9 September 2016, the first appellant filed an affidavit, affirmed
I by one Choong Weng Cheng, asserting its claim on the seized property deposing the reasons as to why the said property ought not to be forfeited.

Decision Of The High Court

[8] The learned High Court Judge had allowed the respondent/applicant's application made under s. 56(1) of Act 613 to forfeit the seized property of RM390,932.70 and any accretion to it held in the Maybank Bhd current account no. 014280-402164 belonging to the first appellant. The High Court held that the seized property of RM390,932.70 were the proceeds of the unlawful activity of the first appellant in evading the payment of customs duties and taxes on the said goods imported from the period of January 2010 until December 2011.

Appellant's Grounds Of Appeal

[9] The grounds of appeal are as follows:

(i) the seized property was the balance of monies remaining in the first appellant's bank account as of 20 May 2014. The seized property was the proceeds of the sale of non-dutiable goods imported by the first appellant on 2 May 2014 and sold to KFC, Malaysia. It was not the proceeds of an offence alleged to have taken place from the period of January 2010 until December 2011;

(ii) the kitchen equipment imported on 2 May 2014 were non-dutiable where no element of customs duties were involved and under the circumstances no offence of fraudulent evasion of any customs duties is disclosed;

(iii) the first appellant, upon receipt of RM1,546,156.80 from KFC, Malaysia for the sale of the non dutiable kitchen equipment, had remitted RM1,496,990 (SGD 580,000) to Simplex Private Ltd, Singapore as the exporter/supplier of the kitchen equipment to the first appellant. On remittance of the aforesaid monies, the balance sum of monies remaining in the first appellant's bank account was RM427,719.56 as of 27 June 2014 which was initially frozen pursuant to an order issued under sub-s. 44(1) of Act 613. On 21 July 2014 the respondent upon a request by the first appellant had instructed Maybank Bhd to release to the first appellant a sum of RM55,000 from the seized property leaving the balance sum of RM390,932.70 which is currently the seized property in question;

(iv) the Customs Department did not make any demand or claim from the first appellant to recover any short-paid customs duties and taxes, if any, as provided under s. 17 of the Customs Act 1967 for the period of January 2010 until December 2011;

(v) the Customs Department did not offer any compound nor prosecute the first appellant for the alleged offence during the period from January 2010 until December 2011, if it is true as alleged by the respondent that the first appellant had committed an offence under sub-s. 135(1)(g) of the Customs Act 1967;

(vi) as a consequence of the freezing and seizing order made pursuant to s. 44 and s. 50 of Act 613 respectively in respect of the seized property, the first appellant had to borrow RM392,065.42 from a third party to make payment towards the salaries, deductions for income tax purposes, contribution to the employees provident fund and social security and other administrative expenses incurred by the first appellant for the month of June 2014;

(vii) the respondent had failed to produce any credible and reliable evidence that the seized property was related or connected to the alleged offence committed between January 2010 until December 2011; and

(vii) the learned High Court Judge had misdirected himself as to the facts and law in ordering the forfeiture of the said property when the respondent had failed to prove in the first instance that an offence had been committed in respect of the goods imported on 2 May 2014. The seized property was only related or connected to the importation of the kitchen equipment on 2 May 2014 and had no nexus to the importation of goods during the period from January 2010 until December 2011. It was wholly unsafe for the learned High Court Judge to rely on the allegation by the respondent/applicant without any proof of the commission of an offence in respect of the goods imported on 2 May 2014.

Our Decision

The Applicable Law

[10] Section 4(1) of Act 613 states that money laundering is an offence. An offence of money laundering under sub-s. 4(1) is said to have been committed when any person engages in, or attempts to engage in, or abet in the proceeds of any unlawful activity or instrumentalities of an offence.

> 4. (1) Any person who:
>
> (a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
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> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;
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> (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
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> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,
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> commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

[11] The word "money laundering" is defined in s. 3 of Act 613 as follows:

"money laundering" means the act of a person who:

(a) **engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity**;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,

where:

(aa) as may be inferred from objective factual circumstance, **the person knows or has reason to believe, that the property is proceeds from any unlawful activity**; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity. (emphasis added)

[12] The word "unlawful activity" in s. 3 of Act 613 is defined as follows:

"unlawful activity" means:

(a) any activity which constitutes any serious offence or any foreign **serious offence**; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence, ... (emphasis added)

[13] The word "proceeds of an unlawful activity" is defined as follows:

"proceeds of an unlawful activity" means any property, or any economic advantage or economic gain from such property, within or outside Malaysia:

(a) which is wholly or partly:

(i) derived or obtained, directly or indirectly, by any person from any unlawful activity;

(ii) derived or obtained from disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or

A (b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii);

B **[14]** From the above definitions it will show that money laundering is principally concerned with the proceeds from any unlawful activity/serious offence.

[15] The word "serious offence" is defined in s. 3 of Act 613 as follows:

C "**serious offence**" means:

(a) any of the offences specified in the **Second Schedule**;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences; (emphasis added)

D **[16]** A look at the Second Schedule shows that on offence under s. 135 of the Customs Act 1967 constitute as a serious offence. Thus from the definition from s. 3 of Act 613, the essence of money laundering is as follows:

E (i) first, there must be an "unlawful activity" which is any activity that is related to the pre-defined list of offences provided under the Second Schedule of Act 613. These pre-defined offences are typically known as the predicate offence;

(ii) secondly, there must also be identifiable proceeds from the said F unlawful activity/predicate offence. These proceeds must be identifiable and specifically and directly connected "in specie" to the unlawful activity/predicate offence;

(iii) thirdly, there must be an act associated with money laundering involving the said identifiable proceeds from the unlawful activities/ G predicate offence. This act is pre-defined under items (a), (b) and (c) of the definition of "money laundering"; and

(iv) lastly, the requisite *mens rea* associated with the offence of money laundering must be present as set-out under items (aa) and (bb) of the definition of "money laundering". H

[17] The forfeiture provision, s. 56 of Act 613 meanwhile states:

Forfeiture of property where there is no prosecution

56. (1) Subject to s. 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under sub-s. 4(1) I or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there

is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property **if he is satisfied that such property is**:

(a) the subject-matter or evidence relating to the commission of such offence;

(b) terrorist property;

(c) **the proceeds of an unlawful activity**; or

(d) the instrumentalities of an offence.

(2) **The judge to whom an application is made** under sub-s. (1) shall make an order for the forfeiture of the property **if he is satisfied**:

(a) that the property is:

(i) the subject-matter or evidence relating to the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) **the proceeds of an unlawful activity**; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under sub-s. (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) **In determining whether the property is**:

(a) the subject-matter or evidence relating to the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) **the proceeds of an unlawful activity**; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

(emphasis added)

[18] It must be noted that s. 56 is two pronged. Before the respondent can make an application for forfeiture to a High Court Judge, the respondent has to meet the requirements or conditions of s. 56(1) of Act 613. The conditions are that the application has to be made before the expiration of 12 months from the date of seizure, or where there is a freezing order, 12 months from the freezing. Further, the respondent has to be satisfied that the seized property is the subject matter or evidence relating to a commission of such offence, a terrorist property, the proceeds of an unlawful activity, or the instrumentalist of an offence before he can make such an application.

[19] Likewise, once the application is before the learned judge, the similar requirements/conditions as in s. 56(1) applies. Before the learned judge can make an order for the forfeiture of the seized property under s. 56(2), he has to be satisfied that the following conditions has been fulfilled by the respondent, namely that:

(i) since s. 56 proceedings is subject to s. 61 of Act 613, that there are no claims from any *bona fide* third parties purchaser in good faith for valuable consideration in respect of the seized property;

(ii) the property was frozen and seized under 613 Act;

(iii) there had been no prosecution or conviction under s. 4(1) of 613 Act;

(iv) the seized property is the subject matter or evidence relating to a commission of such offence, a terrorist property, the proceeds of an unlawful activity, or the instrumentalist of an offence, that is, the seized property was used in the commission of the offence under s. 4(1); and

(v) in determining conditions (i) to (iv), the learned judge shall apply the standard of proof as required in civil proceedings or in other words, the standard of proof on a balance of probabilities.

[20] Having established the essence of money laundering, we pause to observe that s. 56 when read together with s. 4 of Act 613 establishes the necessity for the existence of a predicate offence. The predicate offence here is the offence under s. 135(1)(g) of the Customs Act 1967.

[21] Further, s. 70 of Act 613 reads as follows:

> **Standard of proof**
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> 70.(1) Any question of fact to be decided by a Court in proceedings under this Act shall be decided on a **balance of probabilities**.
>
> (2) Subsection (1) shall not apply in relation to any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act or any subsidiary legislation under it. (emphasis added)

[22] Section 70(2) recognises that when it comes to proving the predicate offence, the burden on the prosecution must be beyond a reasonable doubt.

[23] Once the predicate offence is proved beyond a reasonable doubt, it must then be proved, on a balance of probabilities, that the specific proceeds derived from the predicate offence, was used in the commission of an offence of money laundering (which requires an element of *mens rea*). The specific proceeds derived from the predicate offence must be, *in specie*, the movable and immovable properties sought to be forfeited. In this context, according to the Law Lexicon, *specie* means anything in its own form, not any equivalent, substitute, or reparation.

[24] This link between the predicate offence and the commission of money laundering is a pre-requisite to forfeiture as provided under s. 56 of Act 613.

[25] The court in determining whether the proceeds are from an unlawful activity under s. 4 shall apply the standard of proof required in civil proceedings or as we know it, on a balance of probabilities. This is provided for in s. 56(4) and s. 70(1) of Act 613. As such, the forfeiture proceeding under s. 56 can be deemed to be either a civil forfeiture proceeding or a *quasi*-criminal forfeiture proceeding.

[26] It is therefore trite that the simple existence of an alleged, and as yet unproven, predicate offence is insufficient. The specific proceeds from the said predicate offence must be linked to the offence of money laundering which is crucial to establish the commission of an offence under s. 4(1)(a) and this is a pre-requisite to s. 56(1) of Act 613.

[27] Following from the above, it is incumbent for the respondent to make clear to this court and the appellants, in any application for forfeiture, the following elements:

(i) the exact predicate offence, the evidence and basis upon which the commission of the offence has been established beyond reasonable doubt;

(ii) identify the proceeds of the predicate offence that forms, *in specie*, the property in the hands of the first appellant;

(iii) specify and identify the exact act or acts by which the first appellant committed "money laundering"; and

(iv) specify and identify the manner in which the element of *mens rea* required for the commission of the offence of money laundering may be attached to the first appellant.

[28] The Court of Appeal cases of *Teh Tek Soon lwn. PP* [2015] 1 LNS 1504; *PP v. Billion Nova Sdn Bhd & Ors* [2016] 2 CLJ 763; *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845; *PP v. Kuala Dimensi Sdn Bhd & Ors* [2019] 3 CLJ 650; [2018] 6 MLJ 37; and *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305; [2018] 2 MLJ 401 support the contention that the standard of proof applicable is on a balance of probabilities and not beyond a reasonable doubt.

Respondent's Allegation

[29] The respondent/applicant alleged that the first appellant had committed an offence under s. 135(1)(g) of the Customs Act 1967 by under-declaring the value of the kitchen equipment ie, Manitowoc Ice Machine, Taylor Soft Serve Freezer, Manitowoc Half-dice, Menu-master Oven and Manitowoc Ice Dispenser ("the said goods") imported from the period of January 2010 until December 2011 and thereby the first appellant had fraudulently evaded the customs duties and taxes on the said goods at the

time of import. The respondent further alleged that the seized property were the proceeds of the unlawful activity or offence committed from the period of January 2010 until December 2011.

Issues For Determination

[30] The issues that arose for determination by the High Court were as follows:

(i) whether an offence under s. 135(1)(g) of the Customs Act 1967 had been committed from the period of January 2010 until December 2011;

(ii) whether the seized property were the proceeds of the unlawful activity or the offence; and

(iii) that there is no purchaser in good faith for valuable consideration in respect of the seized property.

[31] Therefore, it is a pre-requisite that the respondent/applicant had to prove that an offence under s. 135(1)(g) of Act 235 had been committed and in this instant case, whether there was a fraudulent evasion of customs duties or taxes on the said goods imported by the first appellant from January 2010 until December 2011 and that the seized property (RM390,932.70) held in the Maybank Bhd current account no. 014280-402164 belonging to the first appellant were the proceeds of such an unlawful activity or offence.

Contention Of First Appellant

[32] The first appellant state that it is a company incorporated in Malaysia and is in the business of importing, dealing and retailing in kitchen equipment and its spare parts. At all material times, the value and the customs duties and taxes paid in respect of the said goods imported by the first appellant during the period of January 2010 until December 2011 were assessed and determined by the proper custom officer pursuant to s. 13(1) of the Customs Act 1967 where such valuation of the goods are deemed correct for the purpose of payment of customs duties and taxes.

[33] The first appellant *vide* the affidavit-in-reply (1) and affidavit-in-reply (2) affirmed by Lim Chee Son @ Lim Chee Song on 30 July 2015 (at para. 8.3 at pp. 2763 to 2799, vol 3 O A) and 18 November 2015 respectively averred that the seized property was not the subject matter of the alleged offence nor the proceeds of the unlawful activity. According to the para. 8.3 of the affidavit-in-reply by Lim Chee Son @ Lim Chee Song dated 30 July 2015, it is stated that RM390,932.70 which is in the first appellant's account as of 25 July 2014 was part of the monies obtained by the first appellant on or about 20 May 2014 in respect of the goods sold to KFC Manufacturing Sdn Bhd ("KFC"), *vide* Invoices No. I201403570 and I201403571. Both these invoices dated 7 May 2014 has no connection to the offence alleged to have been committed by the first appellant for the period from January 2010 until December 2011. Further, Lim Chee Son averred

that on or about 20 May 2014 upon receipt of RM1,546,156.80 from KFC in respect of the sale of the goods, the first appellant remitted SGD580,000 (RM1,496,990) to Simplex Private Ltd, Singapore being the supplier of such goods (hereinafter referred to as "the supplier"). The goods sold to KFC were non-dutiable goods and therefore not subject to payment of any customs duties.

> 8.3 The applicant had failed to consider that the said property, RM390,932.70 which is in the 1st respondent's bank account as of 25 July 2014 in respect of the goods sold to KFC Manufacturing Sdn Bhd ('KFC') *vide* invoice No.I201403570 and I201403571 both dated 7 May 2014 which has no connection to the offence as alleged to have been committed by the 1st respondent for the period from January 2010 until December 2011. On or about 20 May 2014 upon receipt of RM1,546,156.80 from KFC in respect of the sale of the goods, the 1st respondent remitted SGD580,000 (RM1,496,990.00) to Simplex Private Limited, Singapore being the supplier of such goods (hereinafter referred to as 'the Supplier'). The goods sold to KFC were non-dutiable goods and therefore not subject to payment of any customs duties. I am advised by my solicitors which I believe to be true that under the circumstances no offence could have been committed under s. 135(1)(g) of the Customs Act 1967. Therefore the said property is not the proceeds of any unlawful activities as alleged by the applicant to have been committing during the period from January 2010 until December 2011.
>
> Now shown to me copies of the official Receipt 1-05-001028-2014/B18, Customs Declaration Form and all related documents including the purchase order, invoices, delivery order, bank statement and remittance dated 21 May 2014 in respect of the imported goods sold to KFC, annexed herewith and marked collectively as Exhibit 'CSL-2'.
>
> (Note that reference to the 1st respondent in the Affidavit in Reply is the first appellant – Simplex Sdn Bhd in this Appeal)

[34] As stated earlier, the first appellant, upon receipt of RM1,546,156.80 from KFC, Malaysia for the sale of the non-dutiable kitchen equipment, had remitted RM1,496,990 (SGD 580,000) to Simplex Private Ltd, Singapore as the supplier of the kitchen equipment where the balance sum of monies remaining in the first appellant's bank account was RM427,719.56 as of 27 June 2014 which was initially frozen pursuant to an order issued under sub-s. 44(1) of Act 613. On 21 July 2014 the respondent upon a request by the first appellant had instructed Maybank Bhd to release to the first appellant a sum of RM55,000 from the seized property leaving the balance sum of RM390,932.70 which is currently the seized property in question. (See paras. 6, 7 and 8.3 of afidavit jawapan responden-responden (1) of Lim Chee Son @ Lim Chee Song affirmed on 30 July 2015).

[35] The first appellant at all times maintained that the first appellant had not committed any act of fraudulent evasion of customs duties and taxes in respect of the said goods imported during the period from January 2010 until December 2011 for the simple reason that the first appellant had declared the

value of the said goods correctly to the customs officers who in turn had determined the value of the goods in accordance with the valuation rules as laid down in the Customs (Rules of Valuation) Regulation 1999. (See paras. 12 and 13 of afidavit jawapan (1) of Lim Chee Son @ Lim Chee Song affirmed on 30 July 2015 (pp. 2769 vol. 3 OA) and exh. "CSL-3" (vol. 3 OA, vol. 3 OB, pp. 2835 to 3180).

[36] The respondent/applicant contended that the alleged offence was committed for the period commencing from January 2010 until December 2011 but the seized property found in the first appellant's bank was the balance of monies remaining in the first appellant's account as a result of the sales of the non-dutiable kitchen equipment imported on 2 May 2014. Under the circumstances we are of the view that the respondent had failed to show that there was a nexus between the seized property and the alleged offence allegedly committed from January 2010 until December 2011.

[37] It must be noted that the first appellant had produced evidence which was unchallenged by the respondent/applicant that the seized property was the balance of monies remaining in the first appellant's bank account as of 20 May 2014. The seized property were the proceeds of the sale of non-dutiable goods to KFC, Malaysia which were imported by the first appellant on 2 May 2014 and were not the proceeds of an offence alleged to have taken place from the period of January 2010 until December 2011.

[38] Thus in the circumstances, we have to agree with the first appellant that it is evident from the documents exhibited that the kitchen equipment which was imported by the first appellant was non-dutiable and therefore did not give rise to any element of fraudulent evasion of any customs duties. The respondent/applicant had never challenged this crucial piece of evidence in their affidavits-in-reply. Under the circumstances the respondent had failed to disclose that an offence under s. 135(1)(g) of the Customs Act 1967 had been committed.

[39] Further, the respondent had not commenced any prosecution against the appellants in respect of any offence under s. 135(1)(g) of the Customs Act 1967 nor had the respondent made any written demand pursuant to s. 17 of the same to claim from the first appellant any short-paid taxes for under-declaration of the said goods from the period from January 2010 until December 2011. If the respondent believed that the first appellant had fraudulently evaded from paying the customs duties and taxes on such goods at the times of import for the period from January 2010 until December 2011, there are provisions in the Customs Act 1967 which give power to the investigation officer and the Deputy Public Prosecutor to open an investigation paper and prosecute the offender who violates the said Act or make a written demand under s. 17 of the same. Section 17 of the Customs Act 1967 states as follows:

Payment of duty, etc., short paid or erroneously refunded

17. (1) Whenever:

(a) through inadvertence, error, or **for any other reason**, misconstruction on the part of any officer of customs, or through unintentional misstatement as to value, quantity or description by any person, or for any other reason, **the whole or any part of any customs duties or other moneys payable under this Act have not been paid**; **or**

(b) the whole or any part of such customs duties or other moneys, after having been paid, have been, owing to any cause, erroneously refunded,

the person liable to pay such customs duties or other moneys or the person to whom such refund has erroneously been made, as the case may be, **shall pay** the deficiency or repay the amount paid to him in excess, **on demand being made within three years from the date on which customs duty was payable** or deficient customs duty was paid or the refund was made, as the case may be, and without prejudice to any other remedy for the recovery of the amount due, any goods belonging to such person which may be in customs control may be detained until such customs duty or deficiency be paid or the refund be repaid, as the case may be.

(2) Where any amount is payable in accordance with sub-s. (1) the Director General may allow the amount to be paid by instalments in such amounts and on such dates as he may determine. (emphasis added)

[40] In the affidavit of Lim Kee Yee (first investigating officer) dated 22 June 2015, vol. 3A, he stated that through his investigation the first appellant had fraudulently under-declared the goods. If this is so, why was there no prosecution under s. 135(1)(g) or a demand being made against the first appellant under s. 17 of the Customs Act 1967?

25. "Saya menegaskan bahawa hasil siasatan saya pada tahun 2011 menerusi 39 kali pengimportan barangan peralatan dapur restoran dan alatan ganti bagi peralatan di atas cukai yang perlu dibayar oleh "Responden Pertama" kepada "JKDM" adalah sebanyak RM1,062,037.44 bagi duti import dan RM513,332.37 bagi cukai jualan menjadikan kesemua jumlah cukai yang perlu dibayar kepada "JKDM" sebanyak RM1,575,369.44 namun secara curang "Responden Pertama" hanya membayar cukai kastam sebanyak RM115,030.00 bagi duti import dan RM59,598.10 bagi cukai jualan menjadikan kesemua jumlah cukai yang dibayar oleh "Responden Pertama" kepada "JKDM" hanyalah RM174,628.10. Jelas menunjukkan "Responden Pertama" telah terkurang bayar kepada "JKDM" dan kehilangan hasil sebanyak RM1,400,741.34 kepada Kerajaan Malaysia [sesalinan ringkasan pengiraan cukai pengimportan barangan tersebut dilampirkan di sini dan ditandakan sebagai ekshibit "LKY-36".]

A

> 26. Saya menegaskan merujuk kepada "LKY 36" bil.1 pada 07.09.2011 "Responden Pertama" telah melakukan pengimportan barangan dari Singapura dan membuat pengikraran pada borang "K1" bernombor B10109006715. [Segala dokumen berkaitan pengimportan tersebut dilampirkan di sini dan ditanda sebagai "LKY 37(a) hingga LKY 37(r)"].

B

> 27. Saya menegaskan bahawa hasil siasatan terhadap pengimportan "Responden Pertama" pada penyataan saya di perenggan 26 "Responden Pertama" secara curang telah melampirkan satu invoice rekaan bernombor P-4345 (rujuk Ekshibit "LKY 37(k) semasa membuat pengikraran dalam borang 'K1'.

C

[41] A further perusal of the affidavit affirmed by the first investigating officer Lim Kee Yee clearly indicated that the allegation of violation against Act 613 by way of fraudulently evading the payment of customs duties and taxes on such goods at the times of import was done during the period from January 2010 until December 2011 but the respondent only seized the monies from the first appellant's Maybank Bhd current account on

D

25 July 2014. From the respondent's affirmed affidavits there was no evidence to show that the money seized RM390,932.70 was the money obtained from any transactions which were carried out from the period of January 2010 until December 2011. Thus the respondent had failed to show the nexus or link between the money seized and the unlawful activity (under

E

declaration or non-payment of customs duties on the said goods), otherwise the Customs Department would have offered to issue a compound or prosecute the first appellant for the alleged offence during the period of January 2010 until December 2011, if it is true as alleged by the respondent, that the first appellant had committed an offence under sub-s. 135(1)(g) of the

F

Customs Act 1967.

[42] Further we noted that when the first appellant's bank account was frozen pursuant to an order issued under sub-s. 44(1) of Act 613, the monies available in the first appellant's bank account was RM427,719.56. From the facts, it is noted that this sum was the balance of monies remaining in the

G

first appellant's bank account after receipt of RM1,546,156.80 from KFC and after remitting RM1,496,990 (SGD 580,000) to Simplex Private Ltd, Singapore for the import of the non-dutiable kitchen equipment. (Refer to the afidavit jawapan responden-responden (1) by Lim Chee Son @ Lim Chee Song affirmed on 30 July 2015 at pp. 2763 to 2799 vol. 3 OA at para. 21

H

at p. 2792) which read as follows:

> 21. On 21 July 2014 the 2nd investigating officer had instructed the Maybank Bhd to release to the 1st respondent a sum of RM55,000.00 from the sum of RM427,719.56 which was frozen and held in 1st respondent bank account ... .

I

[43] The above paragraph explained that the second investigating officer had instructed Maybank Bhd to release a sum of RM55,000 from the total of RM427,719.56 which was frozen and held in the first appellant's bank account pursuant to an order issued under sub-s. 44(1) of Act 613.

[44] The respondent submitted that the seized property is the subject matter or evidence related to the commission of an unlawful activity. If the seized property was obtained from an unlawful activity as contended by the respondent, then the seized property must be seized in its total sum which was frozen to the amount of RM427,719.56 pursuant to the order issued under sub-s. 44(1) of Act 613, and not on the balance amount after releasing the sum of RM55,000. The instruction of the second investigating officer to Maybank Bhd to release a sum of RM55,000 from the total sum of RM427,719.56 to the first appellant for the purpose of monies due to be paid as salaries for the staffs of the first appellant itself can lead to a conclusion that the seized property (initially at RM427,719.56) were not the proceeds of any unlawful activity or proceeds of any offence under s. 135(1)(g) of Customs Act 1967. Thus the respondent had failed to prove to this court in what circumstances they had released the sum of RM55,000 to the first appellant.

[45] It is trite law that if a property is seized on the basis that it was obtained by way of an illegal or an unlawful activity or in violation of any Act, then the seizure of the said property must be in total, since the seizure of that particular property is a legal action provided by that particular written law. In this appeal the instruction of the second investigating officer to release the amount of RM55,000 to the first appellant for the purpose of paying the salaries of the first appellant's staffs clearly shows that the seizure in this appeal does not reflect the real intention of Act 613 when the said Act was enforced against the first appellant.

Conclusion

To Summarize:

[46] The respondent alleged that the unlawful activity or offence was committed from the period of January 2010 until December 2011. The first appellant had proven through documents and unchallenged affidavits that the seized property were not the proceeds of an offence alleged to have taken place from the period of January 2010 until December 2011 but were the proceeds of the sale of non-dutiable goods imported by the first appellant on 2 May 2014 and sold to KFC, Malaysia. Therefore, the first appellant had proven that they were purchasers in good faith for valuable consideration in respect of the seized property.

[47] The kitchen equipment imported in 2 May 2014 were non-dutiable where no element of customs duties were involved and under the circumstances no offence of fraudulent evasion or under-declaration of any customs duties is disclosed. Therefore, if the respondent contended that there was any under-declaration or evasion detected by the customs' investigating officer from his investigation, the Customs Department can make a written demand from the first appellant for any short-paid taxes under s. 17 of the Customs Act 1967.

[48] If the seized property was obtained from an illegal or an unlawful activity as contended by the respondent, then the seized property must be seized in its total sum, that is the frozen amount of RM427,719.56 pursuant to the order issued under sub-s. 44(1) of Act 613, and not on the balance amount of RM390,932.70 after the release of the sum of RM55,000 to the first appellant.

[49] There was no sufficient judicial appreciation of the law and facts by the learned High Court Judge. In fact, the learned High Court Judge had misdirected himself as to the facts and law in ordering the forfeiture of the seized property under s. 56(2) of Act 613 when the respondent had failed to prove in the first instance that an offence has been committed in respect of the said goods imported on 2 May 2014 and that the seized property was related to the offence of under declaration or evasion of duties and taxes of the said goods (unlawful activity). (Refer to *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 (CA); *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (FC); *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; *Ming Holdings (M) Sdn Bhd v. Tuan Syed Azahari Nor Shahabudin & Ano*r [2010] 6 CLJ 857; [2010] 4 MLJ 577; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453).

[50] Based on all the reasons above, we find merits in this appeal and we unanimously allowed the appeal and set aside the decision of the learned High Court Judge.

[51] Appeal allowed. Decision of High Court is set aside.